In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1277

ALBERT ROVIARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried with three others in the United States District Court for the Northern District of Illinois on a charge that they, along with eight other persons, conspired to import and sell heroin in violation of 21 U.S.C. 174. Petitioner was convicted by a jury,[1] and the court of appeals affirmed. *United*

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[1] One co-defendant was acquitted by the jury; the indictment against another co-defendant was dismissed on the government's motion; the prosecution against the third co-defendant ended in a jury disagreement.

Petitioner alone was indicted and convicted on two counts charging use of a telephone to commit the narcotics offenses in violation of 18 U.S.C. 1403.

States v. *Roviaro*, 379 F.2d 911. Petitioner did not seek certiorari.

In the present action under 28 U.S.C. 2255, the district court denied the motion and the court of appeals affirmed (Pet. App. A and B). Petitioner contends that his conviction must be set aside because of error in the admission of evidence of his conversations with an informer (who testified at trial), overheard by means of an electronic device carried on the informer's person with his consent, and of his telephone conversations with the informer, overheard by government agents with the informer's permission without the aid of electronic equipment. Petitioner also argues that his rights under *Bruton* v. *United States*, 391 U.S. 123, and *Roberts* v. *Russell*, 392 U.S. 293, were violated by the admission of statements of a co-defendant as to his own dealings in narcotics, which did not implicate petitioner and which the trial judge charged were not to be considered in connection with petitioner's guilt unless the jury first found that there was a conspiracy.

We rely on the opinion of the court below in urging that the petition for a writ of certiorari should be denied. We believe that there is no need to delay disposition of this case pending the decision in *United States* v. *White*, No. 46, reargument ordered, January 19, 1970. The Seventh Circuit in the instant case distinguished its *White* decision on the ground that the electronic overhearing here took place prior to the decision in *Katz* v. *United States*, 389 U.S. 347, which

this Court has held does not apply retroactively.[2] *Desist* v. *United States*, 394 U.S. 244. Moreover, this case, unlike *White*, but like *Kaufer* v. *United States*, 394 U.S. 458, arises on collateral attack. Compare *Kaufman* v. *United States*, 394 U.S. 217, 228-229. An additional distinction is that in this case, unlike *White*, the informer testified at trial to the content of the overheard conversations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
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[2] The legality of the telephonic overhearings is governed by *Rathbun* v. *United States*, 355 U.S. 107.

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